No. 04-66

In the Supreme Court of the United States

ABDELA TUM, ET AL., PETITIONERS

v.

BARBER FOODS, INC., DBA BARBER FOODS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Is the time employees must spend walking to and from stations where required safety equipment is distributed compensable under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*

2. Do employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations.

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INTEREST OF THE UNITED STATES

The questions presented in this case concern the compensability under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, of time that employees must spend walking and waiting in connection with the donning and doffing of required clothing and equipment. The United States has a substantial interest in the resolution of those questions. The Secretary of Labor is responsible for enforcing the FLSA as amended by the Portal Act. 29 U.S.C. 204, 211, 216(c), 259. Consistent with that responsibility, the Department has issued regulations that address the compensability of walking and waiting time as well as the effect of the Portal Act on those issues. See, *e.g.*, 29 C.F.R. 785.9, 785.14, 785.24, 785.34, 785.38, 790.6-790.8. The

Department of Labor filed briefs as amicus curiae in the court of appeals in this case, arguing that the walking and waiting time associated with required donning and doffing are compensable under the FLSA and not excluded from compensation by the Portal Act. The Department has also filed suits against employers seeking to require them to compensate their employees for such walking and waiting.

In addition, at the Court's invitation, the United States filed a brief at the petition stage in *IBP, Inc.* v. *Alvarez*, cert. granted, 125 S. Ct. 1292 (2005). The petition in that case raises the question whether walking time that is associated with donning and doffing is compensable under the FLSA. While the United States suggested that prudential considerations counseled against review in that case, it argued that the issue warranted review in an appropriate case, and noted that the issue was presented in this case. The Court granted certiorari in *Alvarez* on the walking time issue and consolidated that case with this one.

STATEMENT

1. The FLSA generally requires covered employers to pay their employees a minimum wage for the hours they work. 29 U.S.C. 206. The FLSA also generally requires employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207. In calculating hours worked for minimum wage and overtime purposes, the FLSA generally includes all time spent on "physical or mental exertion (whether burdensome or not) controlled or required by the employer, and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Because "[r]eadiness to serve may be hired, quite as much as service itself," *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944), the time an employee spends waiting is also counted as compensable work when

the employee is "engaged to wait," rather than "wait[ing] to be engaged." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944). Compensable time thus generally includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946).

Applying those general principles, the Court held that activities that are performed before and after the employee's normal shift can be compensable work. In *Tennessee Coal*, the Court held that underground travel between a mine's portal and the employee's work place within the mine is compensable work. 321 U.S. at 598. In *Jewell Ridge Coal Corp.* v. *Local No. 6167, UMW*, 325 U.S. 161, 163-166 (1945), the Court reaffirmed that conclusion. And in *Mt. Clemens*, 328 U.S. at 690-692, the Court held that walking from an employer's time clock to the employee's place of work and back is compensable work. *Mt. Clemens* also held that certain pre-shift activities, such as greasing arms and sharpening tools, are compensable work. *Id.* at 692-693. The Court further held, however, that pre- and post-shift activities do not require compensation when they involve only a few seconds or minutes of work beyond the scheduled working hours and therefore may be regarded as de minimis. *Ibid.*

Congress viewed *Mt. Clemens* as "creating wholly unexpected liabilities, immense in amount and retroactive in operation," 29 U.S.C. 251(a), and it enacted the Portal Act to address that "emergency." 29 U.S.C. 251(b). See *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956). For claims arising before the date of the Act, the Portal Act eliminated employer liability for failure to pay minimum wage and overtime with respect to work that was not compensable by contract or custom. 29 U.S.C. 252.

Congress took a different approach to claims arising after the date of the Act. For those claims, Congress provided that, absent contract or custom, no employer shall be liable for failure to pay minimum wages or overtime for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a). Thus, absent contract or custom, the Portal Act excludes from compensation travel and other preliminary and postliminary activities when they occur before employees begin their first principal activity or after they conclude their last principal activity of the day. Travel and other activities that occur between the first and last principal activities of a workday, however, are not excluded from compensation by the Portal Act.

In *Steiner*, the Court held that time employees were required to spend changing clothes and showering before and after their shifts was not excluded from compensation under the Portal Act as "preliminary and postliminary" activity. 350 U.S. at 252-253. The Court reasoned that the term "principal activity or activities" in the Portal Act encompasses all activities that are "an integral and indispensable part of the principal activities" an employee is hired to perform, *id.* at 253 (citation omitted), and that the required clothes-changing and showering at issue were an integral

and indispensable part of the employees' principal employment activities. *Id.* at 256.

The Department of Labor has issued regulations on the effect of the Portal Act. The regulations provide that the Portal Act has no effect on the compensability of activities that occur within the "workday," 29 C.F.R. 790.6(a), and define the workday to include all time within "the period between the commencement and completion on the same workday of an employee's principal activity or activities," "whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b).

2. Respondent Barber Foods processes raw chicken into stuffed entrees, chicken fingers, and nuggets. Pet. App. 2a. Respondent's "production lines are staffed primarily by rotating associates, who generally rotate to different positions on the lines every two hours." *Id.* at 22a. Each line is also staffed with set-up operators, who ensure that machines are running smoothly. *Ibid.* In addition, respondent employs meatroom employees, shipping and receiving employees, maintenance employees, and sanitation employees. *Id.* at 24a-25a.

Respondent requires its employees to wear special clothing and equipment. Rotating associates must wear lab coats, hair nets, beard nets, earplugs, and safety glasses. Pet. App. 23a-24a. Set-up operators must wear those same items plus steel-toed boots, bump hats, and back belts. *Id.* at 24a & n.5. Set-up operators, meatroom employees, maintenance employees, and sanitation employees are required to carry lock-out and tag-out equipment. *Id.* at 24a- 25a.

Employees may store certain reusable items in their lockers or take them home and bring them back the next day. Pet. App. 25a. Employees are required to pick up gloves at a supply cage and lab coats at a coat rack. *Id.* at 26a. At times, employees are required to wait in line at the supply cage and coat rack. *Ibid.* At the end of the day,

employees are required to put their glove liners and lab coats in laundry bins located along the hallway between the production floor and the plant exit. *Id.* at 25a. Employees are required to put disposable items of clothing or equipment in trash bins located on the production floor or in the hallway. *Ibid.*

Respondent pays its employees based on the time recorded on a computerized time keeping system. Pet. App. 25a. Employees punch in at time clocks located at the entrances to the production floor and at certain other locations. *Id.* at 26a. They punch out at clocks located near production floor exits. *Ibid.* That clocking system does not capture the time that employees must spend at the beginning of the day waiting to receive their required gear, donning their gear, walking from one gear distribution station to another, and then walking to their work stations. It also does not capture the time they spend at the end of the day walking and then doffing their gear.

3. Petitioners are seven current employees and 37 former employees of respondent. Pet. App. 22a. They filed suit against respondent under the FLSA, seeking compensation for (1) the time they were required to spend donning and doffing their clothing and equipment, (2) the waiting time that is connected with that donning and doffing, and (3) the walking that occurs after donning and before doffing. *Id.* at 31a-32a.

The district court rejected petitioners' waiting and walking time claims, on the ground that such time is excluded from compensation under the Portal Act as preliminary and postliminary activity. Pet. App. 32a-34a. As to the donning and doffing claims, the court concluded that such time is integral to petitioners' principal work activities and therefore not excluded from compensation under the Portal Act. *Id.* at 36a-37a. The court submitted to a jury the question whether the time spent on those activities should be

excluded from compensation as de minimis. *Id.* 40a-41a. The jury determined that the donning and doffing time is de minimis, and the court entered judgment for respondent. *Id.* at 5a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Relying on *Steiner*, the court concluded that the donning and doffing of required gear are integral and indispensable parts of the principal activities of respondent's employees. *Id.* at 7a. The court nonetheless held that the Portal Act excludes from compensation all walking and waiting time connected to that donning and doffing. *Id.* at 8a-14a.

The court rejected the position expressed by the Secretary of Labor in an amicus brief that, consistent with the Department's regulations, the Portal Act does not exempt from compensation any walking time that occurs after donning and before doffing when the donning and doffing are integral and indispensable parts of an employee's principal activities. Pet. App. 10a. The court concluded that the Secretary's position "overreaches" because it would mean that "an employee who dons required equipment supplied by the company at 5:00 a.m., at his own home, starts his workday for FLSA purposes at 5:00 a.m.—even though he is not required to punch in to work and does not punch in until 8:00 a.m." *Id.* at 9a. The court further concluded that the Court's decision in *Steiner* did not require the Secretary's interpretation because *Steiner* held that required donning and doffing is compensable, not that associated walking time is compensable. *Id.* at 10a & n.8. The court also believed that the Secretary's interpretation "pushes so far that it threatens to undermine the Portal-to-Portal Act." *Id.* at 10a.

The court of appeals further held that the time employees must spend waiting to don required gear is not compensable. Pet. App. 11a-12a. The court concluded that "a short amount of time spent waiting in line for gear is the type of activity

that the Portal-to-Portal Act excludes from compensation as preliminary." *Id.* at 12a.

Chief Judge Boudin filed a concurring opinion. Pet. App. 14a-19a. He suggested that it might be appropriate to "treat required donning and doffing as compensable where more than de minimis but, where it is not, leaving both it and any associated walking and waiting time as non-compensable." *Id.* at 18a.

SUMMARY OF ARGUMENT

I. The post-donning and pre-doffing walking time at issue here is compensable because it occurs during the workday. If, as the court of appeals held, the donning and doffing at issue here are integral parts of the employees' principal activities, then they are necessarily part of the workday, as are post-donning and pre-doffing walking time. Such walking is compensable under the FLSA and is not excluded from compensation by the Portal Act.

The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co*, 328 U.S. 680, 690-691 (1946). The Portal Act creates a limited exception to that general rule, excluding from compensation "walking" and other "preliminary" and "postliminary" activities, but only when they occur outside the workday—either before an employee commences or after he completes his "principal activity or activities." 29 U.S.C. 254(a).

In *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), the Court held that the donning and doffing of clothing are "principal activities" within the meaning of the Portal Act when they "are an integral and indispensable part of the principal activities." *Id.* at 253 (citation omitted). Under *Steiner*'s interpretation of the Portal Act, when donning and doffing of clothing are integral and indispensable parts of the employees' principal activities, walking that occurs *after the*

commencement of donning and before the completion of doffing occurs during the workday. Such post-donning and pre-doffing walking therefore falls outside the Portal Act and is compensable.

Here, as in *Steiner*, donning and doffing are integral and indispensable parts of the employees' principal work activities, as both courts below held. Unless they don their required clothing, respondent's employees cannot perform their jobs. Accordingly, the walking that occurs after the commencement of donning and before the completion of doffing is compensable.

The Department of Labor's longstanding regulations confirm that the walking time at issue is compensable. Those regulations provide that the Portal Act does not apply to walking that occurs during the workday—after the commencement of an employee's first principal activity and before the completion of the employee's last principal activity. 29 C.F.R., 785.38, 790.6, 790.7(c). Because the walking time at issue occurs after the commencement of the principal activity of donning and before the completion of the principal activity of doffing, it is compensable under the regulations.

The Secretary's interpretation is consistent with the purposes of the Portal Act. That Act's principal purpose was to remedy an existing emergency that had been created by the Court's decision in *Mt. Clemens*, which held that walking from the time clock to an employee's work station and certain other pre-shift activities were compensable work. 328 U.S. at 691-694. That decision had created "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). Congress fully addressed that emergency by enacting a provision that relieved employers from all liability under the FLSA for activity that occurred before the enactment of the Portal Act, except where the activity was compensable under a contract or custom. 29 U.S.C. 252(a).

For prospective claims, Congress sought to preserve the existing law that had required compensation for all activities during the workday and had included within the workday pre- and post-shift activities that are closely connected to an employee's principal work activities. The only way in which Congress sought to cut back on existing law was by excluding from compensation walking and certain other pre- and post-shift activities that take place before the workday begins and after it ends. Because the walking time at issue occurs during the workday, the Secretary's position that such walking time is compensable is consistent with the purposes of the Portal Act.

II. The waiting time at issue is also compensable. In general, waiting time is compensable under the FLSA when an employee is required to wait and he cannot use the time effectively for his own purposes. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); 29 C.F.R. 785.15. That is true here, because respondent's employees cannot work without obtaining their gear, and they must wait in line to obtain that gear.

Nor is the waiting time excluded by the Portal Act. When employees must wait in order to perform a principal activity, the waiting is an integral and indispensable part of that principal activity and falls outside the Portal Act. 29 C.F.R. 790.7(h). Because the donning in this case is a compensable principal activity, the waiting that is connected to it is also compensable.

ARGUMENT

I. THE POST-DONNING AND PRE-DOFFING WALKING TIME AT ISSUE IS COMPENSABLE BECAUSE IT OCCURS DURING THE WORKDAY

The court of appeals correctly concluded that the donning and doffing of required clothing and equipment are integral and indispensable parts of the principal work activities of

respondent's employees. It nonetheless held that the Portal Act excludes from compensation the time those employees must spend walking from gear distribution stations to their work stations at the beginning of the day and from their work stations to where they doff their gear at the end of the day. That holding is incorrect. Donning and doffing that are integral and indispensable parts of an employee's principal work activities are themselves principal activities within the meaning of the Portal Act, *i.e.*, they are part of the employees' workday. Moreover, the Portal Act does not exclude from compensation walking time that occurs after an employee commences his principal activities and before he completes them, *i.e.*, during the workday.

A. The Walking Time At Issue Is Compensable Under The Language Of The Portal Act As Interpreted In *Steiner*

The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens*, 328 U.S. 680, 690-691 (1946). That general rule reflects Congress's judgment that an employee should generally receive compensation for all time that he is under the direction or control of the employer. *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). The Portal Act creates a limited exception to that general rule. The text of the Portal Act excludes from compensation "walking" to and from "the actual place of performance" of an employee's principal activity or activities, and other "preliminary" and "postliminary" activities, but only when they occur outside the workday—"either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a). Walking that occurs during the workday—after the employee commences his first principal activity and before he concludes his

last principal activity—is not affected by the Portal Act. Instead, such walking is compensable in accordance with the general rule that compensation is required for all time the employee is required to be "on the employer's premises, on duty or at a prescribed workplace." *Mt. Clemens*, 328 U.S. at 691.

An example illustrates the interaction between the FLSA's general compensation rule and the limited exception created by the Portal Act. If an employee's job is to work at several different stations on an assembly line, and he is required to report at the beginning of each day to the first station, the Portal Act excludes from compensation the walk from the factory entrance to the first station. The Portal Act also excludes from compensation the walk from the last work station to the place where the employee clocks out. In contrast, the walk from the first station to the second station and all subsequent walks from one station to another are compensable. The first and last walks are excluded from compensation because they occur outside the workday. 29 U.S.C. 254(a)(1). The walks in between, however, occur after the first principal activity and before the last principal activity of the workday and are therefore compensable in accordance with the FLSA's general rule that an employee is entitled to compensation for all time he is required to spend on the employer's premises, on duty or at a prescribed workplace.

2. Because the Portal Act only excludes from compensation walking that occurs before an employee's first principal activity and after the employee's last principal activity, the scope of the Portal Act's exclusion depends on the meaning of the term "principal activity." The Court addressed the meaning of that term in *Steiner*. In that case, the Court held that the term "principal activity or activities" in the Portal Act "embraces all activities which are an integral and indispensable part of the principal activities." 350

U.S. at 252-253 (citation omitted). Based on that interpretation, the Court held that clothes changing and showering that are integral and indispensable parts of an employee's principal job activities are themselves principal activities and therefore fall outside the scope of the Portal Act's exclusion for preliminary and postliminary activity. *Id.* at 256. Under the Court's analysis, clothes changing and showering that are integral and indispensable parts of a principal activity are compensable as principal activities, without regard to whether they occur on or off the production floor, and without regard to whether they occur before, during, or after an employee's scheduled shift. *Ibid.* See *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 261-263 (1956) (knife-sharpening by meat packers at the beginning and end of their shifts is an integral and indispensable part of their principal activities and therefore compensable).

3. Applying the terms of the Portal Act as interpreted in *Steiner* to the circumstances of this case, the walking time at issue is compensable. In order to perform their jobs, respondent's employees are required to don and doff clothing and equipment on respondent's premises. Pet. App. 24a-25a. Accordingly, here, as in *Steiner*, donning and doffing are integral and indispensable parts of the employees' principal job activities. Because the donning and doffing are integral and indispensable parts of the employees' principal activities, they are themselves "principal activities" as that term is used in the Portal Act. And because donning and doffing are principal activities, they are part of the workday.[1] The walking that occurs after the commencement of the principal

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[1] In this case, the workday of respondent's employees actually begins when they wait in line to obtain required gear. See Argument II, *infra*. If there were no waiting time or the Court were to hold that the wait does not begin the employees' workday, their day would begin with the commencement of donning. In either event, the walking time at issue occurs during the workday and is therefore compensable.

activity of donning and before the conclusion of the principal activity of doffing falls outside the Portal Act: It does not occur "prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a). Such walking is therefore compensable in accordance with the general rule that all time spent on the employer's premises, on duty or at a prescribed workplace is compensable.

4. The court of appeals acknowledged that, under *Steiner*, the donning of required gear is an integral and indispensable part of the principal activities of respondent's employees and therefore not excluded from compensation as preliminary activity under the Portal Act. Pet. App. 7a. The court nonetheless ruled that such donning could not start the workday and thereby require compensation for walking time that occurs after the commencement of donning and before the end of the workday. *Id.* at 9a.

The court of appeals' analysis is mistaken. The operative language of the Portal Act excludes from compensation only those activities that occur before an employee commences, and after he concludes, his "principal activity or activities." 29 U.S.C. 254(a). That operative language determines the compensability of both a particular preparatory activity and the associated walking that occurs after that activity and before the end of the workday. If a particular preparatory activity is an integral and indispensable part of a principal activity such that it qualifies as a "principal activity" (in accordance with *Steiner*), that *necessarily* means that the activity itself does not occur "prior to" the commencement of the employee's "principal activity or activities," and it necessarily follows that walking that occurs *after* that activity cannot occur "prior to" the commencement of the employee's "principal activity or activities." *Ibid.* "To give these same words a different meaning for each category would be to

invent a statute rather than interpret one." *Clark* v. *Suarez Martinez*, 125 S. Ct. 716, 722-723 (2005). An activity that is an integral and indispensable part of a principal activity is either a "principal activity" under the Portal Act or it is not. It cannot be a principal activity for purposes of determining the compensability of that activity and not a principal activity for purposes of determining the compensability of *subsequent* walking. *Id.* at 723. Because *Steiner* held that an activity that is an integral and indispensable part of a principal activity is itself a principal activity, both the activity itself and walking that occurs after the commencement of that activity and before the end of the workday fall outside the Portal Act.

For that reason, the court of appeals' observation (Pet. App. 10a n.8) that *Steiner* did not expressly address the compensability of walking time is beside the point. *Steiner*'s interpretation of the term "principal activity" necessarily means that, if donning and doffing are themselves compensable principal activities, the walking that occurs after the commencement and before the conclusion of those principal activities falls outside the scope of the Portal Act.

B. The Department Of Labor's Regulations Confirm The Compensability Of The Walking Time At Issue Here

1. The Department of Labor has issued interpretive regulations setting forth the principles for determining the number of hours worked, 29 C.F.R. Pts. 785 *et seq.*, and addressing the effect of the Portal Act on that computation. 29 C.F.R. Pts. 790 *et seq.* The hours-worked regulations have their origin in Interpretive Bulletin No. 13, which was originally issued in 1939 (shortly after enactment of the FLSA), and which was in effect when Congress enacted the Portal Act. The Portal Act regulations were originally issued in 1947, immediately after enactment of that Act. See 12 Fed. Reg. 7655. Those contemporaneous and long-standing regulations, which have been left undisturbed by

Congress in its numerous subsequent reexaminations of the FLSA and which reflect the considered and detailed views of the agency charged with enforcing the FLSA and the Portal Act, are entitled to deference. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002) (*Chevron* deference appropriate absent notice-and-comment rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given to the question over a long period of time"); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").[2]

The Department's hours-worked and Portal Act regulations reinforce the conclusion that walking is compensable when it occurs after the commencement and before the completion of compensable donning and doffing. The regulations explain that compensable work generally includes all time "during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." 29 C.F.R. 785.7 (citation omitted). That general rule applies not only to the time that an employee is involved in productive work, but also to required waiting time, 29 C.F.R. 785.7, 785.14-785.17, normal rest periods, 29 C.F.R. 785.18, and travel during the course of the workday. 29 C.F.R. 785.38. The regulations except from that general rule and treat as non-compensable "bona fide meal periods," 29 C.F.R. 785.19, and "[p]eriods during which an employee is

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[2] In 1949, moreover, as this Court indicated in *Steiner*, Congress amended the FLSA but specifically retained the Portal Act regulations, without expressing any disagreement with the provisions relevant here. See 350 U.S. at 255 & n.8; Fair Labor Standards Amendments of 1949, ch. 736, § 16, 63 Stat. 920.

completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes." 29 C.F.R. 785.16.

The regulations explain that the Portal Act creates only a limited exception to the general rule that an employee is entitled to compensation for activities that occur while the employee is on the employer's premises, on duty or at a specified work station. The regulations state that the Portal Act has no effect on the compensability of activities that occur within the "workday," 29 C.F.R. 790.6(a), and define the workday to "include[] *all time* within" the "period between the commencement and completion on the same workday of an employee's principal activity or activities," "whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b) (emphasis added). Thus, "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. 790.6(a).

The regulations specifically address the effect of the Portal Act on the compensability of travel. They explain that while time spent walking from the plant gate to the place where the employee performs his principal activity is excluded by the Portal Act from the category of "principal activities" and is not compensable, 29 C.F.R. 790.7(f), 790.8(a), travel from the place of performance of one principal activity to the place of performance of another principal activity is not subject to the Portal Act (because it occurs during the workday) and is instead subject to the general rules for determining compensability under the FLSA. 29 C.F.R. 790.7(c).

Under the FLSA, "[t]ime spent by an employee in travel as part of his principal activity, such as travel from job site

to job site during the workday, must be counted as hours worked." 29 C.F.R. 785.38. When an employee is required to report to a designated place to pick up his tools, for example, and must then travel to another location to perform his work, "the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked." *Ibid.* Similarly, the regulations specify that if an employee is required to report to a designated place for instructions, the travel from the place where he receives his instructions to the place where he carries out those instructions must be counted as hours worked. *Ibid.* In those examples, picking up tools and receiving instructions are integral and indispensable parts of the employees' principal activity or activities, and accordingly qualify as principal activities for purposes of the Portal Act. 29 C.F.R. 790.8(b). As a result, the travel that occurs after those initial activities and before the end of the workday falls outside the Portal Act.

This case is controlled by the foregoing principles. As both courts below found (Pet. App. 7a, 36a-37a), the donning and doffing of required gear on respondent's premises are integral and indispensable parts of the principal activities of respondent's employees because their work cannot be done without that gear. See 29 C.F.R. 785.24, 790.8(c). The employees' workday therefore commences no later than donning and ends with doffing, and the necessary walking that occurs between those two points falls outside the Portal Act and is compensable under the FLSA.

2. In accordance with the interpretation of the Portal Act expressed in the regulations, the Secretary of Labor has consistently taken the position in litigation that walking that occurs after compensable donning and before compensable doffing is itself compensable. Thus, for example, the Secretary filed suit seeking compensation for such walking time in *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994). The Secre-

tary entered into a consent judgment in *Chao* v. *Perdue Farms, Inc.*, Case No. 2:02-CV-0033 (M.D. Tenn. entered May 10, 2002), that requires the employer to compensate employees for walking that occurs between the donning and doffing of required gear. The Secretary is currently engaged in two district court proceedings in which she is seeking compensation for such walking. *Chao* v. *Tyson Foods, Inc.*, No. 02-CV-1174 (N.D. Ala. filed May 9, 2002); *Chao* v. *George's Processing, Inc.*, No. 6:02-CV-03479-RED (W.D. Mo. filed Nov. 20, 2002). And the Secretary filed amicus briefs in the courts of appeals in this case and in *Alvarez* v. *IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), cert. granted, 125 S. Ct. 1292 (2005), taking the position that such post-donning and pre-doffing walking time is compensable.

3. The court of appeals concluded that the force of the Department of Labor's longstanding regulations and the Department's consistent practice is offset by footnote 49 of the Portal Act regulations. Pet. App. 8a-9a (citing 29 C.F.R. 790.7(g) n.49); *id.* at 10a (concluding that the Department of Labor's regulations "cut both ways"). The footnote states:

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. 790.7(g) n.49 (citations omitted).

The exact import of the footnote is unclear on its face, particularly in light of the fact that the first-quoted sentence refers to postliminary activity whereas the second sentence seems to contemplate travel occurring *after* the washing or

clothes-changing activity at issue (which, in the case of travel after postliminary activity, would certainly be excluded from otherwise compensable time by the Portal Act in any event). At most, this passage could be read to reserve the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking time falls outside the Portal Act. Even that reading would provide no support for the court of appeals' holding that the Portal Act always excludes such walking from compensation.

In any event, the ambiguous passage cited by the court of appeals should not obscure the following points. First, the regulations discussed above reflect the Department of Labor's long-established general position that walking that occurs after the commencement of donning and before the completion of doffing falls outside the Portal Act when the donning and doffing are integral and indispensable parts of an employee's principal activities. Second, in the many years in which the Department has enforced the FLSA and the Portal Act, it has not issued any ruling identifying any circumstance in which such walking would be excluded from compensation under the Portal Act. And third, the Secretary has repeatedly taken the position in litigation that, in circumstances like those presented here, the Portal Act does not exclude from compensation walking that occurs after the commencement and before the completion of compensable donning and doffing. In those circumstances, the regulations as a whole support the Secretary's position that the walking time at issue in this case is compensable.

Any doubt regarding the meaning of the regulations must be resolved in favor of the Secretary's interpretation. As this Court has recognized, courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to

agency's interpretation of its regulations as set forth in amicus brief). The detailed and comprehensive regulations discussed above, when read as a whole, plainly support the Secretary's longstanding and consistent position regarding the compensability of walking time like that at issue here. And in any event, that conclusion is also compelled by the text of the Portal Act as interpreted in *Steiner*.

C. The Secretary's Position Is Consistent With The Purposes Of The Portal Act And Does Not Produce The Consequences That Concerned The Court Of Appeals

1. The court of appeals rejected the Secretary of Labor's position regarding the compensability of the walking time at issue here in large part because the court concluded that the Secretary's position would defeat the purposes of the Portal Act. Pet. App. 10a. That conclusion reflects a misunderstanding of the purposes of that Act.

The principal purpose of the Portal Act was to remedy an existing "emergency" that had been created by the Court's decision in *Mt. Clemens*, which held that walking from the time clock to an employee's work station and certain other preliminary activities were compensable work. See 29 U.S.C. 251(b); *Steiner*, 350 U.S. at 253. Employees filed numerous claims in the wake of *Mt. Clemens*, and Congress believed that if those claims were allowed to proceed it would create "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). As the Court explained in *Steiner*, 350 U.S. at 255-256, Congress fully addressed that emergency by enacting Section 2 of the Portal Act, 29 U.S.C. 252, which relieved employers from all liability under the FLSA for activity that occurred before the enactment of the Portal Act, and eliminated federal court jurisdiction to adjudicate such claims, except where the activity was compensable under a contract or custom. See *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), (upholding the constitutionality of Section 2), cert. denied, 335 U.S. 887 (1948).

Congress addressed prospective claims in Section 4 of the Act, 29 U.S.C. 254. For those claims, Congress did not intend any equivalent change from existing law. As the Court explained in *Steiner*, had Congress intended such a sweeping change, it would have made Section 2 prospective as well as retroactive. 350 U.S. at 255-256. Instead, by limiting Section 4 to activities outside the workday, and by using the term "principal activities" to mark the boundaries of the compensable workday, Congress largely sought to "preserve[] to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act." 350 U.S. at 256 (appendix) (quoting 93 Cong. Rec. 2297 (1947) (statement of Sen. Cooper)).

Before enactment of the Portal Act, the Administrator and courts had taken the position that pre- and post-shift activities are compensable when they are closely connected to principal job activities, and Congress intended to preserve that development. 93 Cong. Rec. at 2297. Congress was confident that its use of the term "principal activities" would have that effect because it understood that term to encompass not only the activities that occur during an employee's normal shift, but also pre-shift and post-shift activities that are an integral and indispensable part of those principal activities, such as oiling machinery, sharpening tools, handing out clothes, and changing clothes. *Id.* at 2297-2298. See *Steiner*, 350 U.S. at 255. The only way in which Congress sought to cut back on existing law was by excluding from compensation those preliminary and postliminary activities that are not integral and indispensable parts of an employee's principal activities. See 29 U.S.C. 254(a)(1) and (2); 93 Cong. Rec. at 2299 (statement of Sen. Cooper).

Thus, the Secretary's position—*i.e.*, that walking time that occurs after donning and before doffing is compensable when the donning and doffing are integral and indispensable

parts of an employee's principal activity—is fully consistent with the purposes underlying the Portal Act. The court of appeals' position, by contrast, conflicts with this Court's recognition in *Steiner* that "Congress * * * did not intend to deprive employees of the benefits of the Fair Labor Standards Act where [the activities at issue] are an integral part of and indispensable to their principal activities." 350 U.S. at 255.

2. The court of appeals also believed that adoption of the Secretary's position would produce consequences that Congress could not have intended. The court hypothesized that, under the Secretary's position, "an employee who dons required equipment supplied by the company at 5:00 a.m., at his own home, starts his workday for FLSA purposes at 5:00 a.m.—even though he is not required to punch in to work and does not punch in until 8:00 a.m." Pet. App. 10a. The Secretary's position does not lead to that consequence.

Under the Secretary's longstanding interpretation of the Portal Act, when an employee has the option to don and doff required clothing and gear at home, that activity is not integral, not compensable, and does not begin or end the workday. The Department's regulations specify that the donning of required equipment is a compensable principal activity "where the changing of clothes *on the employer's premises* is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8 n.65 (emphasis added). The Wage and Hour Field Operations Handbook, which provides official guidance for the Department of Labor's FLSA investigations, elaborates on the Secretary's position. It states that "[e]mployees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not

working time." Department of Labor, *Wage and Hour Field Operations Handbook* § 31b13 (1996).

The court of appeals concluded that there was no basis for the Secretary's distinction between donning clothes on an employer's premises and performing that activity at home. Pet. App. 9a-10a. But that distinction reflects the Secretary's reasonable judgment that employer control is an important factor in determining whether an activity is an integral and indispensable part of an employee's principal activities. When an employer dictates that the clothes-changing process take place at the work site, the time involved is effectively no longer the employee's. Cf. *Mt. Clemens*, 328 U.S. at 691 (distinguishing compensable on-premise walking time from uncompensable commuting time in part on the ground that "[t]he employees' convenience and necessity * * * bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so"). In contrast, an employee who dons required gear at home is engaged in activity that is analogous to that of any employee who dresses for work in the morning. The Secretary's emphasis on the degree of employer control also ameliorates any concern about undermining the purposes of the Portal Act in light of the Act's prospective focus.

D. The Amount Of Time Devoted To Donning And Doffing Does Not Affect The Compensability of Associated Walking Time

In his concurring opinion, Chief Judge Boudin suggested that the compensability of walking associated with donning and doffing should depend on whether donning and doffing involves so little time that it should be regarded as de minimis. Pet. App. 18a. That approach reflects an inappropriate application of the de minimis rule.

1. The Court held in *Mt. Clemens* that an employee is not required to compensate an employee for time spent

on walking and other preliminary activities when they involve only a "few seconds or minutes of work beyond the scheduled working hours," and therefore may be regarded as "de minimis." 328 U.S. at 692. That de minimis rule, however, has nothing to do with whether an activity begins or ends the workday for purposes of the Portal Act. Instead, under the language of the Portal Act, any "principal activity" can begin and end the workday, regardless of how long that activity takes to perform. 29 U.S.C. 254(a).

The legislative history to the Portal Act confirms that conclusion. During the course of the Senate debates, Senator McGrath asked Senator Cooper whether an employee's preshift activity of handing out clothes in the morning had to consume at least 30 minutes before it would be regarded as a "principal activity." Senator Cooper responded that it would be a principal activity whether it took "15 or 10 minutes or five minutes or any other number of minutes." 93 Cong. Rec. at 2298. In *Steiner*, the Court placed special weight on the views of Senator Cooper in determining the meaning of the Portal Act. See 350 U.S. at 256-259.

The Department of Labor's regulations similarly do not require that a preparatory activity consume a particular period of time before it is considered a "principal activity." See 29 C.F.R. 790.8(b) n.63 (construing legislative history to indicate that "any amount of time" will suffice). The relevant question under the regulations is instead whether the preparatory activity is an integral part of a principal activity. 29 C.F.R. 790.8(b). The examples cited in the regulations of picking up tools or receiving instructions before traveling to a work site demonstrate that the amount of time devoted to an activity is not material in determining whether it is a principal activity that starts the workday. Picking up tools or receiving instructions might take only a few minutes or less. But as the regulations make clear, both activities are principal activities that can begin the workday, thereby

rendering subsequent travel time excluded from the scope of the Portal Act and compensable under the FLSA.

2. The nature of the de minimis rule explains why it plays no role in determining whether a particular activity begins or ends the workday. Properly understood, that rule does not apply separately to each particular activity viewed in isolation. A de minimis determination instead requires consideration of the aggregate amount of time for which an employee seeks compensation. *Kosakow* v. *New Rochelle Radiology Assocs.*, 274 F.3d 706, 719 (2d Cir. 2001); *Brock* v. *City of Cincinnati*, 236 F.3d F.3d 793, 804-805 (6th Cir. 2001); *Reich* v. *Monfort, Inc.*, 144 F.3d 1329, 1333-1334 (10th Cir. 1998); *Bobo* v. *United States*, 136 F.3d 1465, 1468 (Fed. Cir. 1998); *Lindow* v. *United States*, 738 F.2d 1057, 1063 (9th Cir. 1984); *Dunlop* v. *City Elec., Inc.*, 527 F.2d 394, 401 (5th Cir. 1976).

Practical considerations support that approach. An activity-by-activity approach would lead to complex threshold inquiries aimed at delineating the relevant activities for purposes of applying the de minimis rule. Almost any activity can be broken down into constituent parts that could be conceptualized as individual activities. For example, donning could be broken down into the separate activities of putting on a lab coat, putting on a hair net, putting on earplugs, and putting on safety glasses. At the same time, almost any activity could be conceptualized as part of a larger activity. For example, donning, doffing, associated waiting, and associated walking could be conceptualized as one activity —the process of donning and doffing. Applying the de minimis analysis to the aggregate amount of otherwise compensable time avoids the complex threshold questions required by an activity-by-activity approach.

More fundamentally, viewing a particular activity in isolation as de minimis and therefore non-compensable would thwart the purposes of the FLSA. For example, an activity-

by-activity approach would allow an employer to require employees to perform a series of activities at the beginning and end of the day that each consume a brief period, but that in the aggregate require 30 minutes of work, and then pay his employees for only eight hours of work, rather than for the 8 1/2 hours the employees actually worked. The de minimis rule is designed to discourage the filing of lawsuits that involve truly insubstantial claims, not to provide the employer with a mechanism for obtaining from his employees a free half-hour of work each day. For that reason, the de minimis rule must be applied to the aggregate period of time for which an employee seeks compensation.

Thus, under the de minimis rule, it is irrelevant whether the donning and doffing, considered in isolation, consume a de minimis amount of time. Rather, the relevant question is whether the aggregate amount of time devoted to donning, doffing, associated walking, and associated waiting is de minimis. If the aggregate time is de minimis, all of the time is non-compensable, even if it occurs during the workday. On the other hand, if the aggregate time is not de minimis, the de minimis rule is simply inapplicable. It plays no role in determining when the workday begins and ends.[3]

II. THE WAITING TIME AT ISSUE IS COMPENSABLE BECAUSE RESPONDENT'S EMPLOYEES ARE REQUIRED TO WAIT AND THE WAITING IS AN INTEGRAL AND INDISPENSABLE PART OF THE PRINCIPAL ACTIVITY OF DONNING

The court of appeals also erred in holding that the time that employees must spend waiting to receive their clothing and equipment is not compensable. That time is com-

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[3] In this case, the jury determined that donning and doffing, when viewed in isolation, consume a de minimis amount of time. The jury did not consider, however, whether donning, doffing, associated walking, and associated waiting, when viewed in the aggregate, consume a de minimis amount of time.

pensable because the waiting is an integral and indispensable part of the principal activity of donning.

1. In general, waiting time is compensable under the FLSA when an employee is "engaged to wait" rather than waiting to be engaged. See *Skidmore*, 323 U.S. at 136-137. An employee is engaged to wait when the "time is spent predominantly for the employer's benefit," rather than for the employee's. *Armour*, 323 U.S. at 133. Thus, when an employer requires the employee to wait and the employee cannot use the waiting time effectively for his own purposes, such waiting time is generally compensable. 29 C.F.R. 785.15. A messenger who reads the newspaper while waiting for an assignment, a firefighter who plays checkers while waiting for an alarm bell, and a factory worker who talks to fellow employees while waiting for his machine to be repaired are all engaged in compensable waiting. See *ibid.*

The waiting time at issue in this case is required by the employer and cannot be used effectively by the employees for their own purposes. Respondent's employees cannot perform their jobs without obtaining required gear, and in order to obtain that gear, they must wait in lines at distribution points. Respondent's employees are therefore engaged to wait, rather than waiting to be engaged.

Nor does the Portal Act exclude that waiting time from compensation as a preliminary activity, as the court of appeals concluded. See Pet. App. 10a-12a. As already discussed, the Portal Act does not exclude from compensation preliminary activities that are integral and indispensable parts of principal activities. Because donning required gear and equipment is a principal activity, and respondents' employees are required to wait in line to undertake that principal activity, that waiting is an integral and indispensable part of the principal activity of donning.[4]

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[4] Because the initial wait is an integral and indispensable activity, it begins the workday of respondent's employees. Even if that initial wait

2. The Department of Labor's regulations confirm that the waiting time at issue in this case is compensable. Under the regulations, when an employer requires its employees to wait to undertake a principal activity, the waiting is treated as an integral and indispensable part of that principal activity. The regulations specifically explain that when an employee "is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities." 29 C.F.R. 790.7(h).

In contrast, when the wait is occasioned by a voluntary early arrival, it is treated as a non-compensable preliminary activity. See 29 C.F.R. 790.7(h). Similarly, when the wait is connected with a non-compensable preliminary or postliminary activity, rather than with a principal activity, the wait is generally treated as preliminary or postliminary as well. For example, because checking in (or punching a time card) at the beginning of the day, and checking out at the end of the day, are preliminary and postliminary activities rather than principal work activities, the regulations treat normal waiting time associated with those activities as non-compensable preliminary and postliminary waiting. 29 C.F.R. 790.7(g). Similarly, because obtaining a pay check at the end of the day is a postliminary activity and not a principal work activity, the regulations treat normal waiting

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did not begin the workday, however, waiting that occurs after the commencement of donning and before the completion of doffing would occur during the workday for the reasons explained in Argument I, *supra*. Accordingly, such waiting would be compensable even if the initial wait were not.

time associated with obtaining a pay check as a non-compensable postliminary activity. *Ibid.*

Under the regulations, as under *Skidmore* and *Armour*, the waiting time at issue in this case is compensable. It is required, rather than volitional. And it is an integral and indispensable part of the primary activity of donning, not a component of a non-compensable preliminary or postliminary activity such as checking in or obtaining a pay check. The court of appeals therefore erred in holding such waiting time non-compensable.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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